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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

SAVANNAH SUGAR REFINING CORPORATION, *Petitioner,*

versus

ADAM BAXTER, *Respondent.*

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

OPINION BELOW AND JURISDICTION

The case was tried before the Honorable Anthony A. Alaimo, Judge, United States District Court, Southern District of Georgia, who entered his Order on October 6, 1972, which is reported at 350 F.Supp. 139.

The Court of Appeals for the Fifth Circuit rendered its opinion on June 6, 1974, reported at — F.2d —. The Court of Appeals refused a petition for a rehearing on July 9, 1974.

The Order of the District Court, the Opinion of the Court of Appeals, and the Order refusing the petition for rehearing are printed in the Appendix hereto.

Jurisdiction of this Court lies under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

The questions presented are:

1. Has the Fifth Circuit Court of Appeals decided an important federal question in a way which conflicts with applicable decisions of this Court by allocating the order and burden of proof in a manner that is inconsistent with the Court's decision in *McDonnell Douglas Corporation* v. *Green,* 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973).

2. Is the important federal question regarding the order and burden of proof in a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.,* controlled by the decision in *McDonnell Douglas Corporation* v. *Green,* 411 U.S. 792, 36 L.Ed. 668, 93 S.Ct. 1817 (1973), and if not, should it be settled by a definitive decision of this Court.

3. Does the decision of the Fifth Circuit Court of Appeals reversing and remanding the case to the district court for determination of back pay conflict with the decision of the Third Circuit in *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240 (3rd Cir. 1973), the decision of the Sixth Circuit in *Manning* v. *General Motors Corporation,* 466 F.2d 812 (6th Cir. 1972) and the decision of the Ninth Circuit in *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002 (9th Cir. 1972), all of which hold that the award or denial of back pay

is within the sound discretion of the trial court and that such discretion should be exercised in the light of all the circumstances.

4. Does the decision of the Fifth Circuit Court of Appeals conflict with the decision of the Eighth Circuit Court of Appeals in *Parham* v. *Southwestern Bell Telephone Company,* 433 F.2d 421 (8th Cir. 1970), by holding that the good faith positive efforts of Petitioner toward providing equal employment opportunities is irrelevant and is not to be considered by the trial court in the exercise of its discretion to award or deny back pay.

5. Does the decision of the Fifth Circuit Court of Appeals truncating the exercise of the district court's discretion to award or deny back pay conflict with the congressional resolve to place the question of back pay within the sound discretion of the trial court.

STATUTE INVOLVED

The pertinent statute, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) is set forth in the Appendix, *infra,* page 42a.

STATEMENT OF CASE

Petitioner's principal business is the refining, distribution and sale of cane sugar. It was organized in 1917 and maintains its headquarters and executive offices in Savannah, Georgia, and its principal refinery or production facility at Port Wentworth, Georgia. A majority of the employees are engaged in the production, packaging and shipment of sugar. The various job classifications in the refinery are organized into

departments or "stations". Each station involved in the production, packaging or shipment of sugar contains two or more job classifications. As of June 30, 1971 Petitioner employed 433 regular employees at its refinery.

Respondent, Adam Baxter, is an employee of Petitioner, his regular job being that of an electrician's helper, although he also served as relief boiler room helper. Baxter filed this case on March 8, 1968, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as the Act) and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Baxter alleged that he had been unlawfully denied a promotion to a foreman's position in the boiler room.

Trial of this case was had in Savannah, Georgia, before Anthony A. Alaimo, District Judge, on May 28 and 29, 1972. The issues before the court were: (1) was Baxter discriminated against because of his race by not being promoted; (2) did Petitioner discriminate against the class represented by Baxter and if so what remedies, including back pay, were available to correct this discrimination; and (3) was Baxter entitled to an award of attorney's fees.

After extensive briefing by the parties, the District Court entered its Order on October 6, 1972 (App. 1a) and found: (1) the Petitioner had not discriminated against the Respondent Baxter in failing to promote him to the position of boiler room foreman; (2) the Court did not award back pay to the class represented by Respondent in that the Respondent has not proved discrimination against any specific individual in the class and Petitioner had acted in good faith and made a positive effort to eliminate pre-act segregation prac-

tices, and (3) although there was no proof of any discrimination within the class by Petitioner, certain of Petitioner's promotion practices were subjective in nature and the Court entered a decree ordering Petitioner to implement certain objective promotion practices and made an award of attorney's fees to counsel for Respondent of $12,500.00.

On appeal, the Fifth Circuit Court of Appeals affirmed the trial court's holding that Baxter had not been discriminated against, but remanded the case for further hearings to determine the right of class members to back pay and also for the purpose of recalculating the amount of attorney's fees to be awarded to Baxter's attorneys.

The issue on this Petition is that of the remand for further hearings on the issue of back pay.

In his complaint filed March 8, 1968, Baxter sought to represent all blacks employed at Petitioner's refinery at Port Wentworth, Georgia. On December 9, 1968, pursuant to Rule 23(c)(1) of the Fed. R. Civ. Pro., the district court ruled that the cause could proceed as a class action with the class limited to the blacks employed in the boiler room operation. *Baxter v. Savannah Sugar Refining Corporation,* 46 F.R.D. 56 (S.D. Ga. 1968). The Order of the Court made it clear, however, that Baxter was entitled to seek discovery concerning employment practices in all operating departments. The Order was expressly made subject to alteration or amendment at a later date.

Thereafter, and more than two years before trial, counsel for Baxter took only the depositions of the Plant Superintendent and Secretary of Petitioner.

They made no effort to take the depositions of any other plant employees before the trial on May 28, 1972.

Prior to trial, a series of pre-trial hearings were held. At such a hearing on January 18, 1972, the district court advised counsel for all parties that he would not confine the evidence to practices in the boiler room, but would allow evidence of employment practices throughout the plant. At this same hearing the court ordered the parties to exchange lists of witnesses and documentary information.

Baxter's list of proposed witnesses included employees in various departments of the plant. Thus it was patently evident that Baxter was prepared to and planned to introduce evidence of alleged discrimination throughout the plant. As a result, on January 26, 1972, Petitioner took depositions of five of these employees.

Among the many exhibits in this case was Petitioner's Exhibit 35 (R. 830(a)-875(a)), consisting of 45 pages. This exhibit showed the name, race, nature of job promotion, qualifications considered necessary for promotion to each job, and reasons for promotion of every individual promoted in the plant since 1965. Moreover, and more significantly it showed that Petitioner analyzed each job classification and identified the essential skills or traits necessary for successful performance of the job. The "reasons for promotion" reflect why the company chose each employee for each promotion. Also the Petitioner presented Exhibit 36 (R. 878(a)-898(a)) consisting of 20 pages of a similar detailed schedule indicating thereon a job-by-job analysis of the reasons for every person employed at the plant since 1965.

These exhibits were furnished to counsel for Respondent some three weeks before trial, but counsel made no effort of discovery nor did they take depositions of any employees of Petitioner with reference to any of the matters contained in these exhibits.

In this regard it is particularly significant that counsel for Respondent had filed with the court a motion to enlarge the class, and on May 17, 1968, the district court reserved ruling on the motion until trial, but advised all counsel that Respondent would have the right to introduce evidence with respect to plant-wide discrimination. This was a reiteration of the court's previous announcement that it would allow such evidence. On the date of trial the court ruled that the class would include all black employees at the plant.

At trial, Baxter testified and called three of the employees whose depositions had been previously taken by Petitioner as well as a former employee. With the exception of Baxter, none of the other witnesses complained of any white employee having received a promotion over him—in fact they complained of promotions of other blacks. Baxter relied primarily on statistical evidence previously produced by Petitioner which indicated that the average pay received by whites was greater than that received by blacks.

During the course of the trial the personnel counselor of Petitioner reviewed (R. 482a-486a) Petitioner's Exhibit 35 (R. 830a-875a) and supplemented the detailed analysis of the name, race, job description, and qualifications of every person promoted in the plant since 1965 with further explanation of the standards for promotions. Despite this massive exhibit of 45 pages and the testimony in support thereof, Baxter

offered no rebuttal evidence on this point. This evidence of Petitioner stood and remains uncontradicted.

The district court in its Order of October 6, 1972, found:

> "On the other hand Plaintiff has not proved discrimination against any specific individual to the Court's satisfaction." (App. 10a)

The Court did find, however, that Petitioner's promotion procedures might allow the subjective judgment of Petitioner's supervisors to influence promotions.

The Court then found (App. 12a):

> "*In the absence of satisfactory proof of discrimination within the class,* the Court does not find that the employer's promotion practices have, in fact, deprived the class within the prohibitions of 42 U.S.C. Sec. 2000e-2(a)(1) only that such practices *tend* to deprive the class of employment opportunity within the statutory prohibitions of 42 U.S.C. 2000e-2(a)(2)." (Emphasis supplied)

The Court further found no evidence of racial discrimination in Petitioner's system of hiring and also found that the rest rooms, locker and dining facilities at the plant were used by all employees without regard to race. (App. 12a)

With respect to back pay the district court held that two factors combined to make an award of back pay inappropriate.

> "First, the Defendant has acted in good faith and made a positive effort to eliminate pre-Act segregation practices."

"Second, the Plaintiff has failed to produce satisfactory proof that such relief is needed to make the class whole." (App. 13a)

The Court then stated (App. 13a):

"There has been no proof of a significant number of members of the group possessing qualifications who have been damaged by discriminatory practices notwithstanding their qualifications for promotion."

"Additionally, the Court was impressed with the evidence that Defendant's wage rates are higher than those of any other industry in the Savannah Metropolitan area; its unbroken history of annual wage increases to all employees, without any discrimination; its policy, broken only during three Depression years, of 15% annual bonus to all employees; its summer student employment program for employees' children, again without the slightest evidence of any discrimination; its policy of no layoffs when jobs were abolished by automation. In substance, the Court feels that the evidence supports the conclusion that the Defendant was a poor target for this type action." (App. 13a)

Against this background of no proof of discrimination against any individual, the case proceeded to the Fifth Circuit Court of Appeals; and on June 6, 1974, that court entered its decision remanding the case for a determination of those employees who might be entitled to back pay. In so doing the court stated:

"Concerning the burden of proof imposed on the class of discriminatees, we think the district court acted prematurely in requiring individual proof of economic loss and committed error in mandating that an individual establish that he had the prerequisite 'qualifications' for a higher position in

the initial proceedings to ascertain the nature of employment practices." (App. 32a)

"Therefore, there is a strong presumption that a number of the individual members of the class would have received promotions to better paying white positions if Savannah's promotion process had been based on merit." (App. 33a)

There was no finding by the Fifth Circuit Court of Appeals that the trial court had "abused its discretion" in denying back pay to the class, nor was there even an attempt to distinguish the trial court's finding of no discrimination against any individual employee. Rather, it *assumed* that discrimination against class members had occurred from the trial court's finding that certain of Petitioner's practices had an *abstract* tendency to discriminate, notwithstanding the trial court's express finding that as a matter of fact these practices had never operated to discriminate against any class member.

ARGUMENT

THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THAT THE FIFTH CIRCUIT HAS ALLOCATED THE BURDEN OF PROOF IN A MANNER THAT IS INCONSISTENT WITH THE SUPREME COURT'S DECISION IN MC DONNELL DOUGLAS CORPORATION V. GREEN, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973)

In *McDonnell Douglas Corporation* v. *Green, supra,* this Court granted certiorari "in order to clarify the standards governing the disposition of an action challenging employment discrimination." This Court then decided the "proper order and nature of proof in

actions under Title VII of the Civil Rights Act of 1964" and provided the following outline:

> Step 1: The plaintiff has the initial burden of establishing a prima facie case by showing (1) that he belongs to a racial minority; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
>
> Step 2: The employer then has the burden of showing a legitimate, nondiscriminatory reason for plaintiff's rejection.
>
> Step 3: Plaintiff must then be given the opportunity to rebut the defendant's evidence and show that the purported justification was pretextual. Here statistics may be useful in determining whether the employer's actions were part of a general pattern of discrimination against blacks.

While the Court spoke within the framework of discrimination in hiring, the logic and reasoning of the Court's statements apply with equal force to litigation involving discrimination in promotions.

Petitioner submits that the decision of the Court of Appeals is in conflict with that of *McDonnell Douglas Corporation* v. *Green, supra* in that:

1. Respondent did not carry his burden of proof with regard to Step 1 in that no individual discrimination was proved in the district court. The trial court specifically found: "on the other hand, Plaintiff has not proved discrimination against any specific individual to the Court's satisfaction." (App. 10a)

2. The Fifth Circuit Court of Appeals *ignored* the fact that Petitioner carried its burden (Step 2) of proving that there was no discrimination against any employee with respect to promotions.

The Court of Appeals excused Respondent's failure to prove any instance of factual discrimination because in its view, to do so would be unduly burdensome because of the lack of objective criteria and qualifications for promotion. The Court of Appeals thus totally ignored the fact that Respondent was in possession of Petitioner's Exhibit 35 for some three weeks prior to trial. Baxter had more than ample opportunity to offer Step 1 evidence showing that members of the class were qualified for promotion based on the objective standards provided in the exhibit and that non-class members with equal or less qualifications were promoted over qualified class members. The excusal of this failure to prove individual discrimination represents a departure by the Court of Appeals from the standards of *McDonnell Douglas Corporation* v. *Green.*

Petitioner offered proof under Step 2 that showed job related justifications for each promotion since 1965 but Respondent failed to contradict or rebut any of this evidence. The Fifth Circuit thus erred by not requiring Respondent to show that Petitioner's Step 2 justifications were pretextual. To allow Respondent to correct his failure of proof in a subsequent remedy proceeding would destroy the utility of the *McDonnell Douglas Corporation* outline of proof.

Moreover, the Court of Appeals departed from its own standard set forth in *United States* v. *Jacksonville Terminal Company,* 451 F.2d 419, 446 (5th Cir. 1971). There, in a pattern and practice case, the government

ntroduced statistics showing post-Act hiring and job ssignment inequities between blacks and whites. Offi- ials of the employer testified at length to the effect that ll post-Act decisions on hiring and assignment were based solely on qualification and merit. The govern- ment did not attempt to rebut this evidence, but relied exclusively on the statistical evidence previously sub- mitted. The Court of Appeals held that once the em- ployer introduced testimony justifying its actions, it became incumbent upon the government to rebut this testmony by showing that the employer's justification did not coincide with employment reality.

Under the *Jacksonville Terminal* standard, the deci- sion of the trial court in the instant case was due to be affirmed. At trial, Baxter placed into evidence statistics showing an earnings disparity between black and white employees. Petitioner placed its promo- tional system in the record as well as documentary evidence (Ex. 35), supplemented by the testimony of its officers, to the effect that each promotion had been made on the basis of racially neutral objective criteria. Had such discrimination existed, Respondent, at this point, should have attempted to contradict this evidence by showing that qualifications were not job related or that whites were preferred over blacks possessing equal or superior qualifications. Instead, Respondent chose to stand on its previously introduced statistics.

Thus, the Court of Appeals decision giving respond- ent a second opportunity to offer this proof is a depar- ture from its own standards enunciated in *Jacksonville Terminal,* where it stated that *no case* supports the proposition that statistics outweigh a defendant's evi- dence manifesting business necessity for job assign- ment decisions.

By departing from the standards of this Court set forth in *McDonnell Douglas Corporation* v. *Green, supra,* and its own standards in *United States* v. *Jacksonville Terminal Company, supra,* the Fifth Circuit Court of Appeals has in effect denied Petitioner due process of law in violation of the fifth and fourteenth amendments to the Constitution of the United States. In allowing the Respondent to prevail without rebutting Petitioner's proof showing that all promotion decisions were made on a racially neutral basis, the Court of Appeals has, in effect, held that statistics can create an irrebuttable presumption of discrimination. This Court has uniformly held, however, that any irrebuttable presumption is violative of the constitutionally guaranteed right of due process of law. *Cf. Cleveland Board of Education* v. *LaFleur,* — U.S. —, 94 S. Ct. —, 39 L.Ed. 2d 52 (1974); *Vlandis* v. *Kline,* 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed. 2d 63 (1973); and *Stanley* v. *Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972).

In summary, the Court of Appeals has:

1. Ignored the specific finding of the district court that there was no discrimination against any individual.

2. *Assumed* that such discrimination existed, notwithstanding Petitioner's uncontradicted and unrebutted proof to the contrary.

3. Assumed that factual discrimination existed on the basis of statistics alone (Step 3 above) despite the total absence of proof by Respondent establishing a single instance of factual discrimination.

4. Erroneously and prematurely remanded this case to the trial court, thus allowing Respondent to prove individual discrimination in a subsequent remedy proceeding (on the assumption that factual discrimination had been proved) when in fact *no* factual discrimination has ever been proved against Petitioner.

5. Refused to require plaintiff to show any instance of individual discrimination after the employer had effectively and uncontradictedly rebutted plaintiff's statistical evidence, thereby creating an irrebuttable presumption of discriminaton on the basis of statistics alone.

IN THE ALTERNATIVE, SHOULD IT BE DETERMINED THAT THE STANDARD OF PROOF IN MC DONNELL DOUGLAS CORPORATION V. GREEN DOES NOT APPLY TO CLASS ACTION SUITS, THEN THIS CASE INVOLVES A FEDERAL QUESTION OF THE PROPER ALLOCATION OF THE BURDEN OF PROOF WHICH SHOULD BE SETTLED BY THIS COURT.

Petitioner believes that the decision in *McDonnell Douglas Corporation* v. *Green,* establishing the allocation of and burden of proof in a case under Title VII of the Civil Rights Act of 1964, applies as well to class actions instituted under Title VII. There is no valid reason for any difference in the burden of proof in a class action suit under Title VII as compared with an individual suit under the Act. Moreover, Petitioner believes that this was the clear intent of this Court when it stated at the outset of its opinion that "the case before us raises significant questions as to the proper order and nature of proof in *actions* under Title VII of the Civil Rights Act of 1964," and when this Court stated "in order to clarify the standards governing the disposition of an *action* challenging employ-

ment discrimination, we granted certiorari." (Emphasis supplied.)

Should the Court find, however, that the *McDonnell* case is limited to an individual action under Title VII, then the Court should decide the proper allocation of and burden of proof in a class action suit under Title VII just as it did in the individual action presented in *McDonnell.*

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT REMANDING THE CASE TO THE DISTRICT COURT FOR DETERMINATION OF BACK PAY IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL WHICH HOLD THAT THE AWARD OR DENIAL OF BACK PAY IS WITHIN THE DISCRETION OF THE DISTRICT COURT TO BE EXERCISED IN THE LIGHT OF ALL THE CIRCUMSTANCES OF EACH CASE.

The Act clearly provides that the award of back pay is a matter of discretion.

Section 706(g) of Title VII provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include reinstatement or hiring of employees *with or without back pay.* 42 U.S.C.§ 2000e-5(g). (Emphasis added.)

In this regard, it is of paramount importance to note the basic finding of the trial court:

> "Plaintiff has not proved discrimination against any specific individual to the Court's satisfaction." (App. 10a)

Moreover, the trial court recognized that Petitioner was fully complying with the provisions of the Act when it stated:

> "The Court is convinced that the employer has willingly and conscientiously taken steps to eliminate pre-Act segregation practices." (App. 9a)

In molding its decree, the trial court provided:

> "5. The Defendant shall continue its current practice of giving qualifications paramount consideration in promoting employees." (App. 15a)

The trial court did order Petitioner to adopt an objective system for promotions wherein it would establish written job descriptions, post job vacancies, allow employees to bid on job openings and establish a review committee so that no employee would be denied promotion or transfer solely for the reason that he is not supported by the recommendation of a supervisor. (App. 15a)

On this point, however, the trial court specifically found:

> "This Court does not find that the employer's promotion practices have, in fact, deprived the class within the prohibitions of 42 U.S.C. Sec. 2002-2(a)(1)—only that such practices tend to deprive the class of employment opportunities within the statutory prohibitions of 42 U.S.C. Sec. 2000e-2(a)(2)." (App. 12a)

Based on the record before it, the trial court was clearly justified in refusing to make an award of back pay. On appeal the Court of Appeals did not find any "abuse of discretion" on the part of the district court in refusing to award back pay nor did it determine that the trial court's findings were "clearly erroneous." The simple truth is that the Court of Appeals could not

find an abuse of discretion or that the trial court's findings were clearly erroneous since there was, in fact, no evidence of discrimination against any specific employee.

In the absence of a finding of an "abuse of discretion" by the trial court or a holding that the trial court's findings of fact were "clearly erroneous", it was error to remand the case on the issue of back pay. By so doing, the Fifth Circuit Court of Appeals is in conflict with the decision of the Court of Appeals for the Third Circuit in *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240, 248 (3rd Cir. 1973) the decision of the Court of Appeals for the Sixth Circuit in *Manning* v. *General Motors Corporation,* 466 F.2d 812, 816 (6th Cir. 1972) and the decision of the Court of Appeals for the Ninth Circuit in *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002, 1006 (9th Cir. 1972), all of which hold that the award or denial of back pay is within the sound discretion of the trial court and that this discretion is to be exercised in the light of all the circumstances of each case.

This principal is enunciated succinctly in *Kober* v. *Westinghouse Electric Corporation* 480 F.2d 240 at page 248:

> "(4) The statute says that the court may order such affirmative action as may be appropriate, with or without back pay. It is our determination that this language clearly leaves the award or denial of back pay to the discretion of the district court, to be exercised in the light of all the circumstances of each case."

To the same effect is *Lea* v. *Cone Mills Corporation,* 438 F.2d 86, 87-88 (4th Cir. 1971) which holds that the refusal of the trial court to award back pay is justified when not "clearly erroneous".

The decision of the trial court in denying back pay was correctly made in light of the record before it, and in the absence of a finding by the Court of Appeals that the trial court had "abused its discretion" or that its determination was "clearly erroneous" the denial of back pay by the trial court should have been affirmed.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HOLDING THAT THE "GOOD FAITH" OF THE PETITIONER IS NOT A DEFENSE OR A CRITERIA TO BE EVALUATED BY THE TRIAL COURT IN DENYING BACK PAY IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

The trial court was impressed with the good faith of Petitioner in complying with the Civil Rights Act of 1964 and said so:

> "The foregoing indicates that the pre-Act pattern of segregated job classifications has been reduced by a significant extent through positive efforts by the Defendant. The Court is convinced that the employer has willingly and conscientiously taken steps to eliminate pre-Act segregation practices." (App. 9a)

> "However, keeping in mind that the Defendant's evidence establishes a positive effort to seek out and promote qualified personnel among its black employees, ..." (App. 12a)

> "In substance the Court feels that the evidence supports the conclusion that the Defendant was a poor target for this type action." (App. 13a)

In molding its decree, the trial court reiterated: (App. 15a)

> "5 The defendant shall continue its current practice of giving qualifications paramount consideration in promoting employees."

> "6 The Defendant shall continue to provide training programs to increase the skills and qualifications of its labor force and enable the employees to qualify for advancement and job transfers."

Despite the findings, the Court of Appeals has now held:

> "It is now settled law in our circuit that good faith is not a defense to an action for class-wide back pay." (App. 31a)

The Court of Appeals based its holding upon the erroneous assumption that "discrimination presently continues" . . . (App. 32a) and upon its "presumption" based on statistics that some class members would have received promotions to better paying white positions (App. 33a), when in fact the trial court expressly found to the contrary.

As shown previously, any presumption of discrimination against any individual employee based on statistics was clearly rebutted by Petitioner's Exhibit 35 (R. 830(a)-875(a)) and by the testimony of its personnel counselor (R. 482a-486a) concerning the job qualifications and reasons for all promotions since the year 1965. This evidence was uncontradicted and unrebutted. Therefore, there was no factual basis for any "presumption" by the Court of Appeals that certain class members would have received promotions.

Moreover, this "presumption" flies in the face of the finding of the trial court that "there was no evidence of discrimination against any individual employee." (App. 10a) This Court, and other lesser courts, have consistently stated that Title VII is humanitarian and remedial in nature. No one could, or would, claim that its scope is limited only to those who seek its protection. It is therefore inconsistent with the very core and purposes of the statute to ignore an employer's

good faith efforts to improve the economic footing of its black employees. To ignore good faith and to award back pay here is to punish an employer who has "willingly and conscientiously taken steps to eliminate pre-Act segregation practices." (App. 9a)

Thus, the "settled law" of the Fifth Circuit Court of Appeals that good faith is not a defense to an action for class-wide back pay is squarely in conflict with the purposes of Title VII as well as the decisions of other Circuit Courts of Appeal which have held good faith a valid defense under the Act. *Parham* v. *Southwestern Bell Telephone Company,* 433 F.2d 421, 429 (8th Cir. 1970) (refusing to grant an injunction because of the good faith of the employer); *Manning* v. *General Motors Corporation,* 466 F.2d 812, 816 (6th Cir. 1972) *cert. den.,* 93 S.Ct. 1366 (1973) (wherein the employer was complying with a state statute); *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240 (3rd Cir. 1973) (wherein the employer was complying with a state statute).

THE WRIT SHOULD ISSUE

In *McDonnell,* this Court granted certiorari "in order to clarify the standards governing the disposition of an action challenging employment discrimination".

As in *McDonnell,* this case also "raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964".

In the instant case the Fifth Circuit Court of Appeals has departed from the order of and nature of proof laid down in *McDonnell.*

The decision of the Fifth Circuit Court of Appeals involves an important question of the construction of

the Civil Rights Act of 1964, with respect to the discretion granted by the Act to the trial court to award or deny back pay as the trial court may find appropriate under the circumstances.

The decision of the Fifth Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal with respect to the discretion of the district court in awarding or denying back pay.

The decision of the Fifth Circuit Court of Appeals is in conflict with decisions of other Courts of Appeals with respect to the holding by the Fifth Circuit that the good faith positive efforts of an employer to correct pre-Act discrimination is not a defense or a criteria to be evaluated by the district court in awarding or denying back pay.

It is respectfully submitted that the Writ of Certiorari should issue.

JOHN E. SIMPSON
JOHN B. MILLER
127 Abercorn Street
P. O. Box 8426
Savannah, Georgia 31402

Attorneys for Petitioner

Of Counsel:

MILLER, BECKMANN & SIMPSON
P. O. Box 8426
Savannah, Georgia 31402

CONSTANGY & PROWELL
1900 Peachtree Center Building
230 Peachtree Street, N. W.
Atlanta, Georgia 30303

ELLARBEE & CLARK
750 Coastal States Building
260 Peachtree Street, N. W.
Atlanta, Georgia 30303